

CALIFORNIA ENERGY COMMISSION

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SACRAMENTO, CA 95814-5512
www.energy.ca.gov



April 28, 2005

DOCKET 04-IEP-1D	
DATE	APR 28 2005
RECD.	APR 28 2005

Mr. Andrew B. Brown
Constellation NewEnergy
2015 H Street
Sacramento, CA 95814

Dear Mr. Brown:

Re: Application for Designation of Confidentiality Electricity Supply and Major
Uncertainty and Risk Analysis, Docket No. 04-IEP-01D

On April 1, 2005, Constellation Newenergy, Inc. (CNE) filed Electricity Supply Resources Forms S-1, S-2, S-5 and supporting data for use in the Energy Commission's 2005 Energy Report proceeding. As part of that filing, CNE is seeking a designation of confidentiality for the above-referenced forms and any supporting data.

CNE's application for confidentiality (application) states, in part:

- Form S-1: Capacity Resource Accounting Table. CNE requests that lines 1-12 on Form S-1 be kept confidential.
- Form S-2: Energy Balance Accounting table. CNE requests that lines 1-10 on on Form S-2 be kept confidential.
- Form S-5: Bilateral Contracts. CNE requests that all data on Form S-5 be kept confidential.

The Commission's regulations provide for information to be designated as confidential if it "contains a trade secret or its disclosure would otherwise cause a loss of a competitive advantage." (20 CCR § 2505(a)(1)(D).)

CNE Asserts that:

The information identified above, and any supporting data submitted by CNE contain trade secrets or otherwise commercially sensitive data. The materials identified above should be subject to a rolling five-year confidentiality protection because the information is commercially sensitive and constitutes trade secrets the public disclosure of which would harm CNE. Moreover, this information can be used to determine CNE's market position or business plans to the detriment of CNE and its customers. Accordingly, CNE requests that all of the information and data sets

contained in those documents more specifically described in section 1 above, and any supporting data be designated as confidential.

CNE believes that the public interest in having an open, public debate on key energy issues facing the state can be satisfied by disclosure of information submitted by CNE and the other electric service providers ("ESPs") collectively aggregated on a state-wide basis. Any greater granularity in the data released could expose CNE's market position to its competitors, including other ESPs and utilities. In addition, CNE information for a customer class should be aggregated with the information of one or more other classes where only a small number of customers in the class are served by ESPs. This type of aggregation is consistent with the types of aggregation of ESP data contemplated in the Forms and Instructions.

CNE requests that the identified information also be deemed confidential for the following reasons: The information is commercially sensitive and constitutes a trade secret and is therefore exempt from disclosure. Evidence Code § 1060, Civil Code § 3426.1(d). Moreover, the public interest in nondisclosure clearly outweighs the public interest in disclosure insofar as release of this economic information may directly harm CNE's existing and future commercial opportunities and disclosure may harm CNE's electric customers by foreclosing favorable commercial opportunities. Gov't Code § 6255.

The California Public Records Act allows for non-disclosure of trade secrets (Gov. Code, § 6254(k), Evid. Code, § 1060). The California courts have traditionally used the following definition of trade secret:

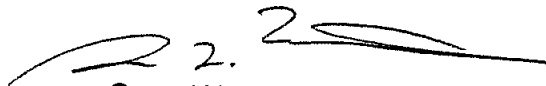
"A trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it..." (*Uribe v. Howie* (1971) 19 Cal.App.3d 194, 207-208, 96 Cal. Rptr. 493, 500-501, from the Restatement of Torts, vol. 4, sec. 757, comment b, p. 5.)

CNE's application of April 1, 2005, makes a reasonable argument under the Energy Commission's regulation for classifying some of the information contained in your application as confidential, since it could provide your competitors with a competitive advantage if made public. (Gov. Code, § 6254 (k); Cal. Code Regs., tit. 20, § 2505.) Accordingly, confidentiality will be granted as follows:

- Form S-1: Capacity Resource Accounting Table. This Table and supporting data have been granted confidentiality for 3 years until the end of 2008.
- Form S-2: Energy Balance Accounting Table. This Table and supporting data have been granted confidentiality for 3 years until the end of 2008.
- Form S-5: Bilateral Contracts: Confidentiality has been granted until 2016 or the contract end of term, whichever is later. For those contracts which contain clauses specifying that the parties to the contract must maintain confidentiality indefinitely, an argument must be produced, independent of the contract clause, explaining why such information could provide your competitors with a competitive advantage if made public. (Gov. Code § 6254(k); Cal. Code of Regs., tit. 20, §2505.)
- Term of confidentiality denied in part. Confidentiality has been denied for your request to keep the information confidential on Forms S-1 and S-2 for a minimum five (5) years with a rolling five(5)-year period applicable to forecast or forward-looking data. Information will be kept confidential until end of 2008.

The procedures and criteria for appealing this decision are set forth in the California Code of Regulations, title 20, section 2505. Be advised that an appeal of this decision, to deny your application, must be filed within fourteen days from my decision. If you have any further questions regarding this decision, please contact Thomas Glaviano, Staff Counsel, at (916) 651-8893.

Sincerely,



Scott W. Matthews
Acting Executive Director

cc: Docket Unit